

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
O'Connell, P.J., and Wilder and Murray, JJ.

JOAN M. GLASS,

Plaintiff-Appellant,

v

RICHARD A. GOECKEL and
KATHLEEN D. GOECKEL,

Defendants-Appellees.

Supreme Court Docket No. 126409

Court of Appeals Docket No. 242641

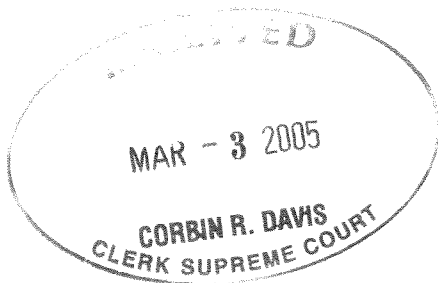
Alcona Circuit Court No. 01-10713-CK

**BRIEF OF AMICI CURIAE, THE MICHIGAN DEPARTMENTS
OF ENVIRONMENTAL QUALITY AND NATURAL RESOURCES**

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QUESTIONS PRESENTED FOR REVIEW

- I. Title to Great Lakes bottomlands is vested in the State and is held in trust to preserve the public's rights to use of the waters and submerged bottomlands of the lakes. The public trust obligations of the State have been codified in Part 325 of the Natural Resources and Environmental Protection Act. The State need not retain full proprietary rights in areas of exposed bottomland but must retain qualified title to preserve the public's rights in those areas when the water returns. Did the Court of Appeals correctly determine that the State, on behalf of the public, holds a qualified title to temporarily exposed Great Lakes bottomlands below the ordinary high water marks of the Great Lakes?**
- II. The qualified title retained by the State in temporarily exposed bottomlands below the ordinary high water mark does not include the right of access by the public to "dry land." The Court of Appeals did not err in holding that Plaintiff-Appellant, as a member of the public, did not have the right to access private, dry beach property below the ordinary high water mark by virtue of the Public Trust Doctrine or its codification in Part 325 of the NREPA. Should this Court clarify the Court of Appeals' determination that the public can traverse the shoreline of the Great Lakes below dry land, by affirming the right to traverse bottomlands where the presence of water and wave action has created areas of wet sand or soil, or shallow water?**

STATEMENT OF BASIS OF JURISDICTION OF THE COURT

Amici Curiae, the Michigan Departments of Environmental Quality and Natural Resources, accept Plaintiff-Appellant's statement regarding the jurisdiction of the Court.

STATEMENT OF PROCEEDINGS AND FACTS

Amici Curiae, the Michigan Departments of Environmental Quality and Natural Resources, accept Plaintiff-Appellant's Statement of Facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Michigan Departments of Environmental Quality and Natural Resources (State) file this brief to address two issues. First is an issue actually raised by the parties in this case – the right of Plaintiff-Appellant, as a member of the public, to traverse the shoreline of the Great Lakes. The Court of Appeals correctly held that even though the public has no right to access "dry land" on riparian property along the Great Lakes, upon gaining lawful access to the shore, the public "is entitled to utilize the lake bottom until it first reaches dry land, for purposes of navigating the Lake Huron shoreline." *Glass v Goeckel*, 262 Mich App 29, 30; 683 NW2d 719 (2004). This should be clarified to recognize the right to walk on the shoreline where the presence of water and wave action has created areas of wet sand or soil, or shallow water.

The second issue was not raised directly by the parties to the litigation and is ultimately unnecessary to the determination of the first issue – the extent and nature of the State's public trust title, held on behalf of the people, in areas of "previously submerged land." Supreme Court Order dated November 19, 2004, ____ Mich ____; 688 NW2d 825; 2004 Mich LEXIS 2495. In deciding the issue before it, the Court of Appeals correctly reaffirmed that title to bottomland areas not presently submerged, but which have been and will again be submerged, are held by the State. "Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state." *Glass*, 262 Mich App at 40. This ruling recognizes the State's qualified title in temporarily exposed bottomlands below the ordinary high water mark of the Great Lakes, which will again be

inundated due to a regular ebb and flow of water due to variations in the levels of the lakes.¹

This principle is unremarkable, based on hundreds of years of common law, and has been expressly memorialized in statute for decades.

The precise nature of the title in such exposed bottomlands should be emphasized as it relates to the issue before the Court. It is a qualified title, grounded in the common law Public Trust Doctrine, and is necessary to protect the public's interest in the use of Great Lakes waters and bottomlands when these areas are again submerged. The qualified title is not possessory in nature and does not authorize access or use by the public.

The Public Trust Doctrine is based on Roman Civil Law precepts that air and water are *publici juris* [owned by the public]. In England, the Public Trust Doctrine was a limitation on the sovereign's otherwise absolute ownership of all property, developed to preclude the sovereign from conveying ownership rights in water or land underneath water and thereby interfering with public use of water. *Shively v Bowlby*, 152 US 1, 11-13; 14 S Ct 548; 38 L Ed 331 (1894). The interests protected under the Public Trust Doctrine are the intrinsic "natural and primary uses" of the waters by the public, as highways of navigation and commerce and for the purposes of fishing. *Id.* at 11. Historically, the area protected by the trust included the shores of waters impressed with the trust. *Id.* at 12.

In this country, the Public Trust Doctrine was the fundamental underpinning of numerous United States Supreme Court cases holding that title to beds of navigable waters, including the Great Lakes, vested in the State, to be held in trust for the people. See, e.g., *Illinois Central RR*

¹ As all of the parties and amici have acknowledged, the Great Lakes are dynamic and have consistent, long-term, cyclical variations in elevation, in addition to seasonal and more frequent variations due to changes in weather and other atmospheric conditions. See United States Army Corps of Engineers, Great Lakes Water Levels Historic Data, available at <http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/> (as visited February 24, 2005).

Co v Illinois, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892). The public trust title originally conveyed to the various states extended to the high water mark in all navigable waters. *Shively*, 152 US at 26-32 (discussing numerous United States Supreme Court cases determining that the high water mark defined the boundary between bottomlands and upland). In Michigan, the public trust in Great Lakes waters and bottomlands has been robustly and consistently upheld. See, e.g., *Obrecht v National Gypsum Co*, 361 Mich 399; 105 NW2d 143 (1960), and *Nedtweg v Wallace*, 237 Mich 14; 208 NW 51 (1926).

Recently this Court recognized the significance of the ordinary high water mark in defining boundaries on the Great Lakes in *Peterman v Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994). *Peterman* involved Great Lakes riparian property on Grand Traverse Bay. In addressing one aspect of the public trust, improvement of navigation, this Court reiterated that riparians hold "limited title" to their property (*Peterman*, 446 Mich at 195) and, conversely, that the public's rights extended (in that case were limited to) the ordinary high water mark, *id.* at 198. The Court of Appeals correctly relied on *Peterman* in reaching its conclusion that the State retained its qualified title in areas of temporarily exposed bottomlands. *Glass*, 262 Mich App at 43.²

Since 1958 there has also been a statute governing the protection, use, and disposition of the Great Lakes bottomlands "belonging to the state or held in trust by it." 1958 PA 94 (amending 1955 PA 247).³ This statute, as amended over time, reflects an effort to codify the

² The Court of Appeals also cited language in *Hilt v Weber*, 252 Mich 198; 233 NW 159 (1930), acknowledging limitations on riparian use of areas between the low and high water mark and recognizing title in the State in those areas. *Glass*, 262 Mich App at 40, 43 (citing *Hilt*, 252 Mich at 226).

³ Now Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 415, as amended, MCL 324.32501 *et seq.*

State's responsibilities and rights under the Public Trust Doctrine. See § 32502 of Part 325, Great Lakes Submerged Lands, of the Natural Resources and Environmental Protection Act (NREPA), 1994 PA 451, as amended, MCL 324.32502; 1958 PA 94, § 2. Since the 1958 amendments, the administrative rules have defined the ordinary high water mark (originally "line") and have defined the bottomlands subject to the statute as all lands below that mark. See 1959 AACRS, R 299.371. In 1968 the statute was amended to provide a defined elevation for the ordinary high water mark for each of the Great Lakes. The defined elevation is in the current version of the statute. See § 32502 of Part 325 of the NREPA, MCL 324.32502.

The ordinary high water mark has been used to define the geographic extent of the State's exercise of its public trust responsibilities under Part 325, and its predecessor, and the State has expressly exercised the right to control uses of bottomlands below the ordinary high water mark on all of the Great Lakes for at least the past 45 years. This has included issuing deeds to riparians, entering leases and use agreements, and issuing permits for use of Great Lakes water and bottomlands. See MCL 324.32503; MCL 324.32515.⁴

Hilt v Weber, 252 Mich 198; 233 NW 159 (1930), is not to the contrary and is an important case in establishing the balance between the intersecting interests on Great Lakes shorelines. In rejecting what was the decidedly unbalanced rule of the "*Kavanaugh* cases"⁵ – that meander lines were the boundary of riparian ownership – the Court made clear that interposing a State fee or possessory right below the meander line was inconsistent with riparian

⁴ A record of the State's administration of Part 325 and the thousands of deeds, leases and use agreements, and permits executed under the statute are not part of the record in this case. The absence of such a record is because the State is not a party to this case and the extent of its title was not an issue litigated below.

⁵ *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928); *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923).

rights. *Id.* at 224, 225, and 227. But in recognizing that riparian title included certain rights and interests in the property to the "water's edge," the *Hilt* opinion did not purport to extinguish and expressly acknowledged retention of the State's interest in areas where the water would return, i.e., between the low and high water marks. *Id.* at 226.

There is nothing inconsistent with the recognition of riparian rights and interests in property extending to the water's edge and simultaneous recognition of the State's qualified interest in areas of exposed bottomland below the ordinary high water mark. Pursuant to the Public Trust Doctrine, the State cannot divest the public's interest in those areas where the water will return. *Nedtweg*, 237 Mich at 17; *Illinois Central*, 146 US at 455. The State need not retain a possessory interest in those areas, however, and *Hilt* has been construed to mean that (a) riparians own land created by permanent accretion or reliction; (b) interposing a fee or possessory interest upland of the water's edge is inconsistent with riparian rights; and (c) riparians have exclusive possession of dry beach areas. See, e.g., OAG, 1978, No 5327, p 518 (July 6, 1978).

This balance of private and public rights is reflected in Part 325 of the NREPA. Consistent with Michigan cases construing the Public Trust Doctrine and riparian rights, the statute expressly preserves riparian rights to land created through natural accretions or reliction. It also only authorizes conveyances of bottomlands to abutting riparian owners, i.e., does not allow interference with riparian rights through conveyances to non-riparians. MCL 324.32502 and MCL 324.32504(1). Finally, as the Court of Appeals rightly determined, there is nothing in the statute that addresses the public's use of exposed bottomland.

Thus, while recognizing the State's retained interest in those areas, the Court of Appeals also did not err in its determination that Plaintiff-Appellant did not have the right to access

Defendants-Appellees' dry beach property below the ordinary high water mark by virtue of the Public Trust Doctrine or its codification in Part 325. See *Glass*, 262 Mich App at 40. Moreover, the Court of Appeals was correct in reaffirming that "as a member of the public, plaintiff is entitled to utilize the lake bottom until it first reaches dry land, for purposes of navigating the Lake Huron shoreline" (*id.* at 46), though the latter ruling should be clarified as follows.

The boundary between lake bottom and dry land on the Great Lakes is not a discrete, defined boundary. The Great Lakes shoreline is dynamic, with long-term, seasonal, weekly, daily, and minute-by-minute changes in the "line" of the water. The public's right to traverse the area where the presence of water and wave action has created wet sand or soil, or shallow water should be affirmed. This is consistent with the Public Trust Doctrine, common sense, and the long-term practice of the public, including riparians like Defendants-Appellees,⁶ in traversing the Great Lakes shoreline.

In sum, if the Court believes the issue to be properly before it, the Court should reaffirm the State's qualified title below the ordinary high water mark in areas of temporarily exposed bottomlands. This qualified title serves to protect the State's interest in preserving the rights of the public to use the waters and bottomlands of the Great Lakes when the water returns. The Court should further affirm the Court of Appeals' decision that the public does not have a right to access private dry beach areas, with the clarification that the public may traverse the areas of bottomland that are not dry land, i.e., where the presence of water and wave action creates areas of wet sand or soil, or shallow water.

⁶ See testimony of Richard Goeckel, reproduced in Plaintiff-Appellant's Brief on Appeal, pp 3-4.

ARGUMENT

- I. Title to Great Lakes bottomlands is vested in the State and is held in trust to preserve the public's rights to use of the waters and submerged bottomlands of the lakes. The public trust obligations of the State have been codified in Part 325 of the Natural Resources and Environmental Protection Act. The State does not retain possessory rights in areas of exposed bottomland but must retain qualified title to preserve the public's rights in those areas when the water returns. The Court of Appeals correctly held that the State, on behalf of the public, holds a qualified title to temporarily exposed Great Lakes bottomlands below the ordinary high water marks of the Great Lakes.**

A. Introduction

The Court of Appeals confirmed in its opinion below that title to temporarily exposed bottomlands remains in the State. "Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state." *Glass*, 262 Mich App at 40. This determination is consistent with the State's longstanding public trust responsibilities and with the established statutory scheme codifying these responsibilities.

It appears necessary, however, to also emphasize the precise nature of the title in such exposed bottomlands.⁷ The title in these areas is a qualified title, grounded in the Public Trust Doctrine, and serves to protect the public's interest in the use of Great Lakes waters and bottomlands when these areas are again submerged. It is not possessory in nature, and it would not authorize access or use of "dry land" by the public.

But it is also not simply the exercise of regulatory authority. It is a limitation on riparian property necessary to protect the public rights in these areas. If this limitation did not exist,

⁷ See, e.g., Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., pp 3-4 and 28 (addressing an argument the State has not made outside of this case and that does not appear to have been made by anyone participating in the case – "the argument that the public has any *fee* ownership interest in property between the water's edge and the so-called 'ordinary high water mark' must fail" (emphasis added)).

riparians would otherwise have the right, for example, to fill exposed bottomlands in times of low water, ensuring that the water would not return, permanently and artificially reducing the Great Lakes, or impeding navigation or harming fishing grounds when the water rises.⁸ The qualified title held by the State on behalf of the public prevents this from occurring. The State cannot abdicate this interest under the Public Trust Doctrine and has codified its responsibilities in Part 325 of the NREPA.

B. The Public Trust Doctrine obligates the State to preserve the public's rights in the Great Lakes and its bottomlands, including temporarily exposed bottomlands. The line between bottomland and upland under the common law was defined by the high water mark and the State was vested with title to the high water mark upon statehood.

Plaintiff-Appellant and Amicus Curiae Tip of the Mitt Watershed Council have provided a comprehensive discussion of the Public Trust Doctrine. (Plaintiff-Appellant's Brief on Appeal, pp 8-21; Brief of Amicus Curiae Tip of the Mitt Watershed Council, pp 21-25.) The State will not duplicate those efforts but would like to emphasize certain key points and provide its analysis of how the Public Trust Doctrine relates to the underlying matter.

1. A Short Background on the Public Trust Doctrine.

The principle of public rights in natural resources that underlies the Public Trust Doctrine can be traced back to Roman civil law. The sixth-century Institutes of Justinian declared that natural resources, including the sea and seashore, were owned by the public: "By the law of nature these things are common to all mankind – the air, running water, the sea, and consequently the shore of the sea." The Institutes of Justinian bk 2, tit 1, pts 1-6, at 65 (J.

⁸ This is precisely what happened historically in the St. Clair Flats in the early part of the century, and later in other parts of the Great Lakes, and necessitated the creation of a statutory framework to address these problems. See now, Part 339, Control of Certain State Lands, of NREPA, MCL 324.33901 *et seq* (St. Clair Flats); Part 325, Great Lakes Submerged Lands, of the NREPA, MCL 324.32501 *et seq* (all State bottomlands below the ordinary high water mark).

Thomas trans 1975). Because the sea and the seashore were commonly owned, the public could access the shore as long as other property interests were not harmed. "No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and the buildings, which are not, like the sea, subject only to the law of nations." *Id.*

English common law also preserved the public's rights in the sea and seashore. Unlike Roman law, however, English law safeguarded the public's rights by vesting title of all tidal waters and lands below the high water mark in the King. *Shively*, 152 US at 11. "The shore is that ground that is between the ordinary high water and low water mark. This doth prima facie and of common right belong to the King, both in the shore of the sea and the shore of the arms of the sea." *Id.* at 12 (quoting Hargrave's Law Tracts). The King held two types of title in the lands below the high water mark: the *jus privatum* title in the King as sovereign, and the *jus publicum* title in the King as representative of the public and for the public benefit. *Id.* While the *jus privatum* title could be conveyed, the private interest was always subject to the King's *jus publicum* title to protect the rights of the public to engage in commerce, fish, and navigate in the waters. *Id.*

American common law expanded the doctrine to all navigable waters. *Id.* In the seminal case of *Illinois Central RR Co v Illinois*, 146 US 387; 13 S Ct 110; 36 L Ed 1018 (1892), the United States Supreme Court made clear that the Public Trust Doctrine applied to the Great Lakes. The Court recognized that the doctrine "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." *Id.* at 436. Thus, the several Great Lakes States were given title to lands under the Great Lakes, "subject to the same trusts and limitations" as are impressed on tidal waters. *Id.* at 437.

2. The Public Trust Doctrine in Michigan.

When the State of Michigan entered the Union on equal footing with the original States, it received title in trust to lands below the high water mark of all navigable waters. *Shively*, 152 US at 26-27.⁹ As trustee, the State has an affirmative obligation to guard against private encroachment of these interests. The State holds the lands "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central*, 146 US at 452.

While the State has a property right in the lands below the high water mark, the Public Trust Doctrine is foremost a restraint on the State's ability to use or convey these lands. As a trustee, the State must act in the best interests of the public. Just as the King was limited in his ability to convey trust lands to private parties, so is the State. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453. The only exception to this limitation is when a conveyance is used to

⁹ Relying on two later United States Supreme Court cases, *Massachusetts v New York*, 271 US 65; 46 S Ct 357; 70 L Ed 838 (1926), and *Vermont v New Hampshire*, 289 US 593; 53 S Ct 708; 77 L Ed 1392 (1933), Save Our Shoreline and Great Lakes Coalition, Inc. contend that *Shively* only applies to tidal waters. (Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., p 8, n 9.) Contrary to Amici's argument, the Supreme Court did not address the extent of the State's title to trust lands upon admission to the Union in either *Massachusetts* or *Vermont*. In *Massachusetts*, the state of Massachusetts obtained private ownership of certain lands by a treaty with New York. 271 US at 81. The Court held that a subsequent private grant of these lands extended only to the water's edge of Lake Ontario at low water mark. *Id.* at 93. In so doing, the Court made clear that "[w]e are not dealing here with the disposition of the *jus publicum*, but with land held by Massachusetts in private ownership and granted by it to private persons." *Id.* at 91-93. In *Vermont*, the Court held that a colonial order established the boundary between Vermont and New Hampshire as the low water mark of the Connecticut River. 289 US at 605.

promote the public interest or there is no substantial impairment of the public interest in the remaining lands and waters. *Id.*

Michigan long ago committed itself to the "universally accepted rules of such trusteeship [over the beds of the Great Lakes]" declared by the United States Supreme Court in *Illinois Central. Obrecht v National Gypsum Co*, 361 Mich 399, 412; 105 NW2d 143 (1960) (citations omitted). Four years after the *Illinois Central* decision, the Michigan Supreme Court relied on the United States Supreme Court's reasoning to determine that the State held title to lands below the Great Lakes as against a riparian owner. *People v Silberwood*, 110 Mich 103; 67 NW 1087 (1896). Justice Moore stated: "It seems to me the reasoning of [*Illinois Central*] is without flaw, and that the law enunciated therein ought to stand as the law of this State." *Id.* at 108.

Later cases affirmed the State's title and responsibilities as trustee. In holding that certain lands were part of the bed of Lake St. Clair, the Michigan Supreme Court stated: "That the State of Michigan holds these lands in trust for the use and benefit of its people . . . cannot be doubted. The State holds the title in trust for the people, for the purposes of navigation, fishing, etc. It holds the title in its sovereign capacity." *State v Venice of America Land Co*, 160 Mich 680, 702; 125 NW 770 (1910). As at English common law, the State may grant the *jus privatum* title to individuals but may never convey the *jus publicum* title because the trust is an inalienable obligation of sovereignty. *Nedtweg v Wallace*, 237 Mich 14, 17; 208 NW 51 (1927).

C. The boundary defining the extent of the State's title is the ordinary high water mark of the Great Lakes. The Court of Appeals correctly relied on the most recent case to address the boundary between State and riparian interests, *Peterman v Dep't of Natural Resources*, where this Court identified the ordinary high water mark as a relevant boundary in defining those interests.

As demonstrated above, the State was vested with title to the bottomlands of its navigable waters upon achieving statehood. This title was extended to the high water mark for a readily

apparent reason. All bodies of water fluctuate within an area defined by high and low water marks. If the sovereign did not retain an interest up to the high water mark, regardless of the water level at any given time, when the water was at the low water mark there would be no restraint on riparian activities (e.g., filling, building structures, or excavating channels) that could prevent the water from returning, impede navigation, destroy fishing grounds, or otherwise infringe on the public's right to use of the waters over that area when water levels rise.

Unfortunately, the few historic Michigan cases discussing the boundaries defining the interests of Great Lakes riparians and the State have been decidedly unclear. This is for two primary reasons. First, in applying the "law of the seas" to the Great Lakes, it is apparent that some courts have failed to recognize an important distinction between oceans, which have little or no long-term changes in levels but regular short-term changes, i.e., tides, and the Great Lakes, which have no tides but have predictable longer-term fluctuations in levels.¹⁰ Thus, for example, in *People v Warner*, 116 Mich 228, 239; 74 NW 705 (1898), the Court clearly failed to recognize the Great Lakes longer-term change in water levels: "If the absence of tides upon the Lakes, or their trifling effect if they can be said to exist, practically makes high and low water mark identical for the purpose of determining boundaries (a point we do not pass upon), the limit of private ownership is thereby marked."

While the beds of the oceans are defined by their smaller, shorter-term shifts in level, the beds of the Great Lakes are defined by larger, longer-term changes in water levels, consequently

¹⁰ As acknowledged in all of the briefs in this matter, the Great Lakes are dynamic and have consistent, long-term, cyclical variations in elevation over 30-40 year periods, in addition to seasonal and more frequent variations due to changes in weather and other atmospheric conditions. United States Army Corps of Engineers, Great Lakes Water Levels Historic Data, available at <http://www.lre.usace.army.mil/greatlakes/hh/greatlakeswaterlevels/historicdata/> (as visited February 24, 2005). (See also, Brief of Amicus Curiae Tip of the Mitt Watershed Council, pp 9-10, Appendices 1-3.)

creating relatively larger and longer-term exposures of lake bottom. But because the water will return, these areas are no less part of the bed of the lake. This difference in the Great Lakes is addressed in the modern concept of the ordinary high water mark that has been utilized in implementing what is now Part 325 of the NREPA and its administrative rules for the past 45 years. The ordinary high water mark defines the line between upland and lake bottomland by reference to the actual, observable differences in the physical characteristics between these two areas even through successive, long-term changes in level.¹¹

Second, and often in combination with the confusion over the difference in low and high water marks on the Great Lakes, courts tried to define a single boundary, with that boundary purporting to separate two fee simple absolute interests. For example, the *Kavanaugh* cases,¹² which are more fully discussed below, unwisely held that surveyed meander lines defined the boundary between fee interests of the State and riparians. But addressing the respective interests on Great Lakes shorelines is not like resolving a lot line dispute between neighboring property owners, and, in the *Kavanaugh* cases, the Court erred in using that simplistic approach because Great Lakes shorelines involve unavoidable overlapping interests. Even while purporting to set a "boundary," the Court acknowledged that such a line would not actually fully define the respective parties' interests. It recognized that riparian rights include the right to access and use of the water, i.e., to cross over the "boundary" and use areas that the State held title to in trust.

¹¹ This difference between tidal waters and other inland navigable waters has been recognized in numerous other cases, with courts still recognizing the long-term high water mark as the relevant boundary for title purposes. See, e.g., *Barney v Keokuk*, 94 US 324; 24 L Ed 224 (1877) (Mississippi River in Iowa).

¹² *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1928); *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923).

Defendants-Appellees and Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc. devote many pages of their briefs to snippets of dicta from Michigan cases,¹³ but this Court recognized the confusion and the lack of any definitive ruling on the issue of "a line" defining the public trust in *People v Broedell*, 365 Mich 201, 205; 112 NW2d 517 (1961). When the question was raised "as to whether the trust ownership of the State should be held to extend to the all-time high-water mark on record, the mean high-water mark, the mean level, the mean-low level, or the lowest water mark," the Court found case law espousing both low water mark and high water mark "theories," but ultimately decided the case could be resolved based on whether the bottomlands were part of a patent.¹⁴ *Id.* at 206.

As is discussed more fully in Argument I.E, *infra*, contemporaneous with *Broedell*, the predecessor to Part 325 of the NREPA, the Great Lakes Submerged Lands Act, 1955 PA 247, as amended, former MCL 322.701 *et seq*, was enacted. Consistent with the public trust, the Legislature enacted a statute to codify its public trust obligations, which covered all the "lake bottomlands . . . belonging to the state of Michigan or held in trust by it." Administrative rules promulgated in 1959 made clear that the statute covered all bottomlands below a defined ordinary high water mark. This definition recognized the longer-term variation in the levels of the Great Lakes and included bottomlands within its definition that might be temporarily exposed but retained characteristics of bottomland because they were submerged regularly, and for a sufficient time. In other words, the State codified the reach of its public trust title to the high water mark, as clearly provided at common law, but refined and defined the boundary by

¹³ Defendants-Appellees' Brief on Appeal, pp 8-12; Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., pp 9-18.

¹⁴ "Patented Lands" were lands transferred by direct grants from the governments prior to statehood.

reference to the ordinary high water mark. Subsequent to *Broedell* there were few cases challenging the exercise of the State's public trust title on bottomlands, exposed or submerged, below the ordinary high water mark.¹⁵

It is unremarkable then that the Court of Appeals properly identified and relied upon a recent case from this Court confirming the significance of the ordinary high water mark in defining the State's public trust responsibilities, *Peterman v Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994). *Peterman* involved Great Lake riparian property, on Grand Traverse Bay, that had been damaged due to the Department of Natural Resources' construction of a dock and jetties. *Id.* at 180-181. One issue before the Court was whether this damage constituted a taking under the Michigan and United States Constitutions. *Id.* at 184. A fundamental determination in analyzing any takings case is establishing the extent of the claimant's interest in the property allegedly taken. See, e.g., *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 24; 614 NW2d 634 (2000). In resolving that question, the *Peterman* Court had to determine the extent of the riparian's right or interest in the damaged shoreline, in light of the State's power under the public trust to improve navigation. *Peterman*, 446 Mich at 194.¹⁶

At the outset, the Court recognized there was an important distinction between the Plaintiff's "fast land" and the remainder of their property, the former being defined by the Court

¹⁵ *Klais v Dankowski*, 373 Mich 262; 129 NW2d 414 (1964), involved a discrete question of title to patented bottomlands. *Id.* at 276-278.

¹⁶ Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc. assert that *Peterman* is distinguishable because it concerned the "navigational servitude," not the public trust. (Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., p 28, n 27.) The "navigational servitude" is a federal doctrine. See, e.g., *United States v Cherokee Nation of Oklahoma*, 480 US 700, 704; 107 S Ct 1487; 94 L Ed 2d 704 (1987). The right to improve navigation is one aspect of the public trust; there is no discrete navigational servitude in Michigan.

as property that is "above the *highwater mark* of the stream, river, or other body of water that abuts the property." *Id.* at 181 (citing 26 Am Jur 2d, Eminent Domain, § 192, p 873) (emphasis added). The Court then correctly acknowledged that riparians generally hold "limited title" to their property as against the State's right to improve navigation. *Id.* at 195. Finally, the Court specifically found that the public right to improve navigation extended, but was also limited to, the ordinary high water mark. *Id.* at 198.

Thus, in light of the recognized public rights below the ordinary high water mark (and the corollary limited rights of riparians), the Court held that there typically would be no need to compensate for the loss of the land below the ordinary high water mark. *Id.* at 200. However, due to the unscientific construction of the jetties, causing what the Court believed to be unnecessary damage, it determined that compensation for the property below the ordinary high water mark was required in that case. *Id.* at 201.

Accordingly, the Court of Appeals was correct to rely on *Peterman*, which necessarily determined that the ordinary high water mark served as one relevant boundary for defining riparian and public interests, and properly concluded that the State retains title in exposed bottomlands that will again be covered with water. *Glass*, 262 Mich App at 43.

The Court of Appeals also relied on *Hilt v Weber* that expressly acknowledged limitations on riparian use of areas between the low and high water mark and recognized State title in those areas. *Glass*, 262 Mich App at 40 (citing *Hilt*, 252 Mich at 226). The cited language is:

The riparian owner has the exclusive use of the bank and shore, and may erect bathing houses and structures thereon for his business or pleasure; although it also has been held that *he cannot extend structures into the space between low and high-water mark*, without consent of the State. And it has been held that the public has no right of passage over dry land *between low and high-water mark* but the exclusive use is in the riparian owner, *although the title is in the State*. [Citations omitted; emphasis added.]

Defendants-Appellees and their amici gloss over this language, summarily asserting that in what is otherwise a "carefully crafted" opinion, this language should be ignored because it does not fit their particular view of the holding in *Hilt*. (Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., p 29.) To the contrary, this language demonstrates that *Hilt* did not purport to extinguish the public trust in areas of temporarily exposed bottomlands. If it had, the Court would have clearly and expressly disavowed the authority cited. *Hilt* is nonetheless an important case in defining riparian rights and shaping the balance between public and riparians interests on the Great Lakes. Because of its significance and the level of attention directed to the case by Defendants-Appellees and their amici, it warrants further discussion.

D. *Hilt v Weber* is a significant case in defining riparian rights and in addressing the balance of interests on the Great Lakes shoreline, but it did not purport to extinguish the public trust interests of the State in exposed bottomlands below the ordinary high water mark.

Hilt has been widely discussed in the briefs in this matter. Defendants-Appellees and their amici argue the case is dispositive, standing for the rule that Great Lakes riparians have a fee simple absolute title to the "water's edge," and, consequently, that riparian property is not subject to any public trust constraints. (Defendants-Appellees' Brief on Appeal, p 14; Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., p 19.) *Hilt* is a significant case for rejecting a prior ruling that surveyed meander lines defined the boundaries of riparian property. It is also important in elucidating riparian rights and making clear that interposing a fee or possessory interest on upland between riparian property and the water effectively eviscerates those riparian rights. There is nothing expressly or implicitly in *Hilt*, however, that supports the extreme position taken by Defendants-Appellees and their amici – that riparian owners on the Great Lakes have an unfettered fee absolute title that goes to, and moves

constantly with, the daily, seasonal, and long-term changes in the "water's edge" of the Great Lakes.

The discrete issue in *Hilt* was whether riparian owners had any title in property below the meander line that was formed by permanent lowering of water levels, or reliction. "Reliction" has a clear and established meaning: "An increase in land by the *permanent* withdrawal or retrocession of the sea or a river. Process of gradual exposure of land by *permanent* recession of a body of water." Blacks Law Dictionary, 5th Ed, p 1161 (1979) (emphasis added).

Accordingly, the land at issue was by definition upland and would not be submerged again by cyclical changes in water level. There is nothing in the opinion that indicates the Court did not understand the established meaning of reliction or that it was using some hybrid term gleaned from another opinion.¹⁷

The controversy had arisen because of the decisions in *Kavanaugh v Rabior*, 222 Mich 68; 192 NW 623 (1923), and *Kavanaugh v Baird*, 241 Mich 240; 217 NW 2 (1927). In *Rabior*, the Court held that under the Public Trust Doctrine the State owned fee simple title to the meander line. Meander lines are surveying "shorthand" for designating the shores of bodies of water and are often not accurate depictions of the actual shore. This was a significant problem because virtually all property on the Great Lakes had originally been conveyed based on federal surveys using meander lines. Four years later, the Court held in *Baird* that the State's fee title extended to lands below the meander line even if those lands were the result of accretion or reliction. The result of the *Kavanaugh* cases, and the situation addressed in *Hilt*, was that State

¹⁷ See Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., pp 21-25. In fact, the concurring opinion makes clear that the Court was not using some undefined and different definition of reliction. *Hilt*, 252 Mich at 228 (Potter, J. concurring). See also, OAG 1944-45, No 3984, pp 506, 507 (October 25, 1945).

and private parties were asserting fee title in this land and some members of the public were even building cottages on land between riparians and the water.

In deciding this narrow issue and addressing the *Kavanaugh* cases, the Court divided its opinion into three parts. The focus of the opinion was devoted to responding to reasoning of the *Kavanaugh* cases. *Hilt*, 252 Mich at 203-223. The Court also briefly addressed a grab bag of issues, including a discussion of the respective interests of the State and riparians. *Id.* at 223-227. In addressing the two identified rationales for the *Kavanaugh* cases, the Court first correctly recognized that meander lines were merely approximations that did not always accurately reflect the upland boundary of the Great Lakes. *Id.* at 204-205. Much of this part of the opinion was devoted to reciting the analysis of several inconsistent and unclear cases discussing boundaries on the Great Lakes. *Id.* at 207-213. The ultimate conclusion on this issue was that "the purchaser of meandered public land on the Great Lakes took to the water's edge." *Id.* at 213.

The Court then correctly recognized that meander lines did not define the bottomlands of the lakes when the area had become "dry land." *Id.* at 213-223. Included in this "change of status" discussion was a discussion of the riparian right to reliction. *Id.* at 218-223. It is in this portion of the opinion that the Court dealt with the question of reliction and the common law right of riparians to property created by reliction. Again, in its discussion and in the cases the Court cited, it is clear that the Court was using the term "reliction" in its common and, as far as the State can determine, only meaning, as a *permanent* recession of water.¹⁸ In resolving this issue, the Court held that "interposition of a fee title between upland and water destroys riparian

¹⁸ Significantly, it was in the context of discussing rights to relicted land that the Court referred to the concept of a "movable freehold." *Hilt*, 252 Mich at 219.

rights, or rather transfers them to the interposing owner. The basis of the riparian doctrine, and an indispensable requisite to it, is actual contact of the land with the water." *Id.* at 218.

The analysis of these two issues alone provided the Court with the basis for the actual holding in the case:

Kavanaugh v. Rabior and *Kavanaugh v. Baird*, *supra*, are overruled. The *dictum* in *Ainsworth v. Hunting & Fishing Club*, *supra*, "that riparian owners along the Great Lakes own only to the meander line," is overruled. [*Id.* at 227.]

The Court did discuss two additional issues. The first (not relevant to the underlying matter) was the assertion that its holding would require overruling other cases and that the *Kavanaugh* cases should be followed under the doctrine of *stare decisis*. *Id.* at 222-224. The second involved discussing an amalgam of the public interest, takings concerns, and the respective rights of the State and riparians. *Id.* at 224-228.

Unfortunately, the Court's discussion of the public trust is confused because its premise was the situation before it – the State asserting fee title to upland between a riparian and the water – but it then conflated that premise with the State's public trust obligations. The Court referred to the concern for "public control of the lake shores" and providing "proper parks and playgrounds and camping sites and other instrumentalities." *Id.* at 224. It spoke of the "use of the lakeshores by the State" and discussed riparian rights "with special reference to the use of relicted land by the State for park and recreational purposes." *Id.* at 225. Finally, it ominously noted "the overhanging threat of the State's claim of right to occupy it [relicted land] for State purposes." *Id.* at 227. In other words, the entire discussion of riparian rights vis-à-vis the Public Trust Doctrine was based on the incorrect premise that the public trust is defined as some sort of State-provided recreational opportunity.

Simply stated, providing parks, campsites, and other recreational facilities on the Great Lakes shoreline does not define the public trust. It is something the State should do, and that the

Legislature has authorized the Department of Natural Resources to undertake,¹⁹ but the public trust is not something the State provides to its citizens; to the contrary, it encompasses the people's rights, which are only held in trust by the State.

Of course, the placement of public recreational facilities on property between riparians and the water would interfere with riparian rights. That may have been the situation created by the *Kavanaugh* cases, but the *Hilt* Court's discussion of that problem has little to do with defining the nature and extent of the public trust. Thus, this discussion in the *Hilt* opinion does not support the arguments of Defendants-Appellees and their amici that the public trust interest of the State above the water's edge was extinguished by *Hilt*. In fact, in the above-quoted passage, page 17, *supra*, the *Hilt* court expressly acknowledged the limitations on riparian use of property between the low and high water marks and that title remained in the State in that area. *Id.* at 226.

In sum, *Hilt* overruled the *Kavanaugh* cases and established the rule that property on the Great Lakes conveyed by reference to a meander line was intended to convey property to the water's edge. The Court further recognized that interposing a fee between a riparian owner and the water destroyed riparian rights, including the right to reliction, and that riparian rights necessarily required contact with the water. Thus, *Hilt* does recognize that riparians have an ownership interest ["took"] to the water's edge. *Hilt* did not, however, purport to create a fee simple absolute interest in riparians, extending to wherever the water line is on a particular day.²⁰

¹⁹ See, e.g., Part 5, Department of Natural Resources, of the NREPA, MCL 324.501 *et seq.*

²⁰ The impossibility of the rule advocated by Defendants-Appellees and their amici of a roving boundary (moving with the ever changing water line of the Great Lakes) between what they acknowledge is the State's unqualified title to submerged bottomlands (Defendants-Appellees' Brief on Appeal, p 8; Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., p 9), and their purported fee simple absolute is apparent. Under this theory, each party is able to exercise its full dominion over "their property" by placing structures, filling, excavating, etc., when that property may no longer be theirs in a week, month, or year.

And to the extent it addressed the issue, the decision recognized the rule that the State retains title to property between the low and high water marks, even when exposed.

Thus, *Hilt* is not inconsistent, and arguably is fully consistent, with recognition that the State retains a qualified title in Great Lakes bottomlands to the ordinary high water mark. This places it in line with established cases extending back hundreds of years, with *Peterman* more recently, and with the statute the State has used to exercise its responsibilities under the public trust for the last 45 years.

E. The State's public trust rights and responsibilities have been codified in a statute governing Great Lakes bottomlands since 1955, including establishing an elevation for the ordinary high water mark as the boundary defining the extent of the State's public trust interest.

Amicus Tip of the Mitt Watershed Council has provided a comprehensive and accurate recitation of the history surrounding Part 325 of the NREPA and its predecessor statute, the Great Lakes Submerged Lands Act. (Brief of Amicus Tip of the Mitt Watershed, pp 12-18, 25-27.) It has also comprehensively described the statutory and administrative rule amendments and provided the relevant documents as appendixes. (*Id.*; Appendixes 5-9.) Again, the State does not wish to provide redundant briefing to the Court but does wish to highlight what it believes are key points and analysis.

The predecessor to Part 325 of the NREPA was enacted in 1955. The original version of the statute only concerned bottomlands that had been artificially filled and allowed the State to convey those areas. The description of the bottomlands covered by the statute was as follows:

The lands covered and affected by this act are all of the unpatented submerged lake bottomlands and unpatented made lands in the great lakes, including bays and harbors thereof, belonging to the state of Michigan or held in trust by it which have heretofore been artificially filled in and developed with valuable improvements. [1955 PA 247, § 2.]

In 1958 the statute was broadened to all include all lands described in the section by removing the limitation to only artificially filled and developed lands. 1958 PA 94, § 2.²¹

The relevant phrase from this provision has been used from the original 1955 statute to the present day Part 325: "belonging to the state of Michigan or held in trust by it." Thus, with other limitations not relevant to the underlying matter,²² the statute covers the Great Lakes bottomlands the State owns or holds in trust. The State concurs with Defendants-Appellees and their amici that the statute did not purport to create a heretofore nonexistent ownership interest in the State. Instead it merely confirmed the ownership of the State in all bottomlands below the high water mark as provided by common law.

The fact that the statute was intended to reflect the State's trust title ownership in all bottomlands below the high water mark was confirmed in the administrative rules promulgated following the 1958 amendment. These administrative rules also refined the high water mark boundary by defining an ordinary high water mark. The definitions of "bottomlands" and "the ordinary high water line [mark]" reflected the status quo that "bottomlands . . . belonging to the state of Michigan or held in trust by it," were all bottomlands below the ordinary high water mark:

(a) "Ordinary high water line" shall refer to that natural line between the upland and the lake bottom land which persists through periodic changes in water levels and below which the character of the natural soil and vegetation and the profile of the surface of the soil have been affected and worked upon by the waters of the lake at high stages as to make them distinct in character from the upland. This character of the soil, surface shape, or vegetation may be somewhat altered during exposure at low stages in the fluctuations of the water levels, but will be

²¹ The amendment also removed the phrase, "and have been developed with valuable improvements." The sentence then read, ". . . *including those lands* which have heretofore been artificially filled in." 1958 PA 94, § 2 (emphasis added).

²² For example, the statute only covers unpatented lake bottomlands. This removes from the umbrella of the statute lands that were sold by patent prior to the State achieving statehood. See *Klais, supra*.

reestablished with the return of high stages. When the soil, vegetation, or shape of the surface have been directly or indirectly altered by man's activity, the ordinary high water line shall be located where it would have occurred had such alteration not taken place.

(b) "Lake bottom land" shall refer to the lands in the great lakes and bays and harbors thereof lying below and lakeward of the natural ordinary high water line. [1959 AACS, R 299.371.]

In 1968, the former Submerged Lands Act, MCL 322.702 *et seq*, was amended to refer to the natural ordinary high water mark and define that line by specific elevations for each of the lakes. 1968 PA 57, § 2. The administrative rule definition of ordinary high water mark was then amended to refer to the elevations provided in the statute itself. 1982 AACS, R 322.1001(j). Finally, the amendments also specifically added language to make clear that the Act did not affect "such rights as may be acquired by accretions occurring through natural means or reliction." 1968 PA 57, § 2.

The elevation for the ordinary high water mark was determined through actual observation and the application of the standard provided by the administrative rule. Namely, the elevations describe a line on the Great Lakes where there is a discernible difference between lake bottomland and upland that persists through the variations in levels of the lakes. In other words, these elevations provide a line defining bottomlands that, even if exposed during certain periods, have been and will be covered by the waters of the Great Lakes when levels rise. Utilizing these elevations to define the reach of the statute is consistent with the State's public trust title to the high water mark, which, as discussed above, was vested in the State so that it could effectively protect those areas from, e.g., activities conducted during periods of low water that would adversely affect the waters or impede their return.

What is now codified as Part 325 of the NREPA has expanded from the original objective of clearing title to land that had been artificially filled and developed with valuable

improvements, to comprehensively controlling uses of bottomlands below the ordinary high water mark. The statute prohibits certain acts without permission of the State. MCL 324.32512. The statute also provides mechanisms for authorizing certain activities if consistent with the public trust. This includes issuing deeds to riparians, entering leases and use agreements, and issuing permits for use of Great Lakes water and bottomlands. See, e.g., MCL 324.32503, 32504, 32512, 32513, and 32515.

Part 325 also contains limitations on the State's authority that are consistent with case law, including *Hilt, supra*. For example, it expressly preserves riparian rights to land created through natural accretions or reliction. MCL 324.32502. It also only authorizes conveyances of bottomlands to abutting riparian owners, i.e., it does not allow interference with riparian rights through purported conveyances to non-riparians. MCL 324.32502 and MCL 324.32504(1). Finally, as the Court of Appeals below rightly determined, there is nothing in the statute that purports to address the public's use of exposed bottomland.

Accordingly, since the late 1950's the ordinary high water mark has been used to define the geographic extent of the State's exercise of its public trust responsibilities under Part 325 and its predecessor, and the State has expressly exercised the right to control uses of bottomlands below the ordinary high water mark on all of the Great Lakes for at least the past 45 years.²³ This exercise of the State's public trust rights and responsibilities through Part 325 is consistent with the common law Public Trust Doctrine and serves to protect the public's interest in the use of Great Lakes waters and bottomlands, taking into account the variable nature of the lakes. Consistent with cases like *Hilt*, the statute also recognizes the interests of riparians and, as the

²³ Again, because the State was not a party to this litigation, the record of the State's administration of Part 325, including the thousands of deeds, leases and use agreements, and permits executed under the statute, are not part of the record in this case.

Court of Appeals held, does not authorize public access to dry areas of temporarily exposed bottomlands.

F. Conclusion.

In deciding the issue before it, the Court of Appeals correctly reaffirmed that title to bottomland areas not presently submerged, but which have been and will again be submerged, are held by the State. "Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state." *Glass*, 262 Mich App at 43. This ruling recognizes the State's title in bottomlands below the ordinary high water mark of the Great Lakes, where there is a consistent long-term ebb and flow of water due to variations in the levels of the lakes. The principle of trust title below the ordinary high water mark is unremarkable, based on hundreds of years of common law, and was supported by the decision in *Peterman, supra*. The boundary of this trust title and the codification of the State's public trust rights and obligations have been expressly codified in Part 325 of the NREPA and its predecessor statutes for 45 years.

It is a qualified title, however, in areas of periodically exposed bottomlands. The title retained by the State serves primarily to protect the public's interest in the use of Great Lakes waters and bottomlands when these areas are again submerged. The qualified title is not a fee and does not authorize access or use of "dry land" by the public.

- II. The qualified title retained by the State in temporarily exposed bottomlands below the ordinary high water mark does not include the right of access to dry land by the public. The Court of Appeals did not err in holding that Plaintiff-Appellant, as a member of the public, did not have the right to access private, dry beach property below the ordinary high water mark by virtue of the Public Trust Doctrine, or its codification in Part 325 of the NREPA. The Court should clarify the Court of Appeals' determination that the public can traverse the shoreline of the Great Lakes below dry land, by affirming the right to traverse bottomlands where the presence of water and wave action has created areas of wet sand or soil, or shallow water.**

As the above discussion demonstrates, the State has title pursuant to the Public Trust Doctrine below the ordinary high water marks of the Great Lakes as defined in Part 325 of the NREPA. The State's title below the ordinary high water mark has been confirmed by *Peterman v Dep't of Natural Resources, supra*. This title is qualified title, however, in areas of temporarily exposed bottomlands, and serves to preserve the public's right to use of Great Lakes waters and bottomlands when those areas are again submerged.

The qualified title in temporarily exposed bottomlands does not authorize access or possession of these areas by the public. *Hilt* helped to define the parameters of public and riparian interest in ruling that the interposition of fee title between a riparian and the water is inconsistent with riparian rights. *Hilt*, 252 Mich at 218. Although the ruling was strictly limited to relicted, i.e, permanently exposed land through the permanent recession of water, the same reasoning would apply to assertion of full fee title by the State in areas of temporarily dry bottomlands. In the course of reaching its ruling, the Court also noted that the use of the relicted land at issue for recreational uses by the State would also be inconsistent with riparian rights. *Id.* at 224. The *Hilt* opinion has been construed by the Attorney General to provide exclusive possession to riparians on areas of dry land between the low and high water marks. OAG 1978, No 5327, p 518 (July 6, 1978). Accordingly, the Court of Appeals did not err in determining that

Plaintiff-Appellant, as a member of the public, did not have the right to access Defendants-Appellees' dry beach areas. *Glass*, 262 Mich App at 30.

On the other hand, there is no dispute between the parties that on bottomlands actually submerged by the water, the State's title is not so qualified. (Defendants-Appellees' Brief on Appeal, p 8; Brief of Amici Curiae Save Our Shoreline and Great Lakes Coalition, Inc., p 9.) It is firmly established that the public trust is impressed on all the waters of the Great Lakes, "whether the water be deep or shallow, and although it be grown up to aquatic plants, and although it be unfit for navigation." *People v Warner*, 116 Mich at 239. Finally, the Public Trust Doctrine historically recognized the right of the public to use of "the shore" itself. *Shively*, 152 US at 12. Accordingly, the Court of Appeals was correct in recognizing that upon gaining lawful access to the shore, "as a member of the public, Plaintiff is entitled to utilize the lake bottom until it first reaches *dry land*, for purposes of navigating the Lake Huron shoreline." *Glass*, 262 Mich App at 30 (emphasis added).

This ruling should be clarified to confirm the public's rights to traverse areas of bottomlands that are not "dry land." As discussed, there is no dispute that the Great Lakes are subject to significant variations in levels, both on a long-term and a short-term basis. As such, terms like "dry land" and "water's edge" can be misleading to the extent that they purport to define a discrete, clearly defined line. There are rarely such boundaries on the Great Lakes. The presence of water and wave action due to weather or other atmospheric conditions creates areas of wet sand or soil and/or shallow water where the waters of the Great Lakes cover and then recede from the shore. These areas where wet sand or soil and/or shallow water are present are clearly not "dry land" and the public has the right to traverse the shoreline in these areas.

Finally, the testimony of Defendant-Appellee Richard Goeckel is compelling and should be highlighted for two reasons. First, although no record has been developed on this issue, the State believes that Mr. Goeckel's view is representative of the views of most riparians and the practice of most users of the Great Lakes. More importantly, it demonstrates that there is no actual controversy between the parties on this issue. Mr. Goeckel made clear that he had no objection to Plaintiff-Appellant, or any member of the public, traversing the shoreline along and even above the water's edge. Although reproduced in Plaintiff-Appellant's Brief on Appeal, the testimony is so compelling it is reproduced here as well.

Q. Do strangers walk along the beach in front of your property on a regular basis?

A. Yes.

Q. Travel over your property and other beach-front properties?

A. They're not traveling over my property. They're traveling next to the water's edge, which is the State of Michigan's property.

.....

Q. Do you walk yourself along the beach near the water line traveling across other people's property?

A. Yes, I do.

Q. That is the custom, as you understand it, for people to walk the beach freely along near the water?

A. Yes.

....

Q. Okay. You indicated that you have no problem with strangers or anyone walking along the beach near the water's edge?

A. That's correct.

Q. And would that include walking on dry sand next to the water's edge? And by next to it I mean within a foot of the water's edge or two.

A. I have no problem with anybody doing that.

Q. So when people walk by on the beach in front of your home they don't walk in the water, their feet aren't wet?

A. That's fairly – that's pretty general. Some people walk in the water, some people walk on the sand. Depends if they got shoes on or they're barefoot. [March 4, 2002 Brief, Exhibit 4 (Richard Goeckel Deposition Transcript), pp 17-19, 35, Appendix, pp 61a-63a, 65a.]

The Court of Appeals was correct in determining that Plaintiff-Appellant, as a member of the public, did not have the right to access Defendants-Appellees' dry beach area. But it was also correct in confirming the right of the public to traverse the shores of the Great Lakes on bottomland areas that are not "dry land." At a minimum, the right of the public to traverse the area where the presence of water and wave action has created areas of wet sand or soil and shallow water should be confirmed.

CONCLUSION AND RELIEF REQUESTED

The question of title in temporarily exposed bottomlands directly implicates the interests of the State and the public for whom it holds title as trustee. The State is not a party to this case and has not had the opportunity to fully participate in these proceedings.

To the extent the Court believes it is appropriate to consider the issue, the Court should reaffirm the State's title below the ordinary high water mark, a title that is qualified in areas that have become exposed. This interest is firmly grounded in the Public Trust Doctrine and is supported by the Court's recent decision in *Peterman* which recognized the importance of the ordinary high water mark as boundary defining riparian and public trust interests. Nothing in *Hilt* is inconsistent with recognition of the State's title below the ordinary high water mark. The public trust title and interests of the State have been codified in Part 325, and its predecessors, for 45 years. The qualified title in temporarily exposed bottomlands is necessary to protect the rights of the public to full use of the waters and bottomlands of the Great Lakes when the water returns. It does not require, however, that the public be allowed to access private, "dry land" areas of shoreline.

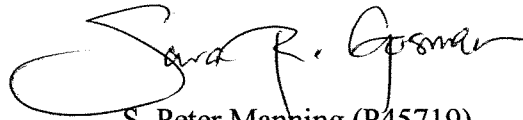
Accordingly, the Court of Appeals did not err in determining that Plaintiff-Appellant, as a member of the public, did not have a right to traverse "dry land" by virtue of the Public Trust Doctrine or its codification in Part 325 of the NREPA. But the Court of Appeals' corollary ruling, reaffirming the right of the public to traverse Great Lakes shorelines on bottomland below

"dry land," should be clarified to expressly recognize the right to traverse the shoreline where the presence of water and wave action has created areas of wet sand or soil, or shallow water.

Respectfully submitted,

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A handwritten signature in cursive script, appearing to read "Sara R. Gosman".

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